Supreme Court, U.S.
FILED
001923 JUN 25 2001
OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

MICHAEL ATHANASIADES,

*Petitioner,*

v.

MICHAEL BOWERSOX, Superintendent of the Potosi Correctional Center,

*Respondent,*

and

JEREMIAH "JAY" NIXON, Attorney General of the State of Missouri,

*Additional Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

BARRY A. SHORT
*Counsel of Record*
LEWIS, RICE & FINGERSH, L.C.
500 N. Broadway, Suite 2000
St. Louis, Missouri 63102-2147
Telephone: (314) 444-7600
Facsimile: (314) 241-6056

*Counsel for Petitioner*

June 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

68 pp

## QUESTIONS PRESENTED FOR REVIEW

(1) May the prosecution deliberately suppress impending plot of fabricated expert testimony without violating *Brady*, by simply disclosing autopsy report refuting fabrication, and, if not, did Eighth Circuit err in denying a certificate of appealability ("COA") from district court's assessment of the constitutional claim?

(2) Did district court err in finding failure to show cause for procedural default of *Brady* claim, because autopsy report refuting fabrication was disclosed to counsel, and, if so, did Eighth Circuit err in denying COA from district court's procedural ruling?

(3) Did district court err in *sua sponte* finding subornation of perjury claim defaulted when state's interest in correcting manifest injustice trumps interest in procedural rule, and when state's rule is not adequate, and, if so, did Eighth Circuit err in denying COA from district court's procedural ruling?

(4) Was defendant deprived of the effective assistance of counsel, when counsel failed to impeach the state's expert's fabricated testimony, and failed to present critical evidence to corroborate defendant's trial testimony, and, if so, did Eighth Circuit err in denying COA from district court's assessment of the constitutional claim?

## PARTIES

The parties to this case are set out in the caption of this case. Mr. Al Luebbers, however, is now the superintendent of the Potosi Correctional Center, and is an appropriate respondent.

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 16

CONCLUSION ..... 29

APPENDIX ..... App. 1

## TABLE OF AUTHORITIES

Page

CASES

*Brady v. Maryland*, 373 U.S. 83 (1963)..17, 18, 19, 20, 21

*Brecht v. Abrahamson*, 507 U.S. 619 (1993)..... 27

*California v. Trombetta*, 467 U.S. 479 (1984)..... 27

*Chambers v. Mississippi*, 410 U.S. 284 (1973)..... 27

*Coleman v. Thompson*, 501 U.S. 722 (1991).....21, 22

*Crane v. Kentucky*, 476 U.S. 683 (1986)..... 27

*Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)..... 16

*Harris v. Reed*, 489 U.S. 255 (1989)..... 25

*Henry v. Mississippi*, 379 U.S. 443 (1965).....23, 25

*Johnson v. Mississippi*, 486 U.S. 578 (1988).....24, 25

*Mooney v. Holohan*, 294 U.S. 103 (1935).....23, 25

*Murray v. Carrier*, 477 U.S. 478 (1986)..... 22

*Picard v. Connor*, 404 U.S. 270 (1971)..... 24

*Rickman v. Dutton*, 864 F. Supp. 686 (M.D. Tenn. 1994).....23, 25

*Slack v. McDaniel*, 529 U.S. 473 (2000)..... 20

*Smith v. Digmon*, 434 U.S. 332 (1978)..... 24

*State v. Athanasiades*, 857 S.W.2d 337 (Mo. Ct. App. 1993).....14, 15

*State v. Paglino*, 319 S.W.2d 613 (Mo. 1958)..... 7

*State v. Weiss*, 24 S.W.3d 198 (Mo. Ct. App. 2000).... 24

*Stone v. Powell*, 428 U.S. 465 (1976)..... 27

TABLE OF AUTHORITIES – Continued

Page

*Strickler v. Greene*, 527 U.S. 263 (1999) ..... 18, 20

*United States v. Agurs*, 427 U.S. 97 (1976) ..... 19, 21

*United States v. Bagley*, 473 U.S. 667 (1985) ..... 19

*United States v. Gonzales*, 90 F.3d 1363 (8th Cir. 1996) ..... 18

*Wainwright v. Sykes*, 433 U.S. 72 (1977) ..... 23

*Williams v. Taylor*, 529 U.S. 362 (2000) ..... 27

STATUTES AND RULES

28 U.S.C. § 1254 ..... 2

28 U.S.C. § 2253(c) ..... 3, 16, 20

28 U.S.C. § 2254 ..... 1, 2, 15, 20

28 U.S.C. § 2255 ..... 20

FED. R. APP. P. 22(b) ..... 16

R.S. Mo. § 575.040 ..... 23

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI ..... 2

U.S. CONST. amend. XIV, § 1 ..... 2

U.S. CONST. art. III, § 2, cl. 2 ..... 2

## OPINIONS BELOW

January 21, 2000 Report and Recommendation of Magistrate Judge, *Athanasiades v. Bowersox, et al.*, No. 4:96CV730CEJ(TIA) (E.D. Mo.).

August 28, 2000 Order of District Court Adopting Report and Recommendation and Denying Petition for Writ of Habeas Corpus.

October 2, 2000 Order of District Court Denying Certificate of Appealability.

December 28, 2000 Judgment of United States Court of Appeals for the Eighth Circuit.

January 26, 2001 Order of Eighth Circuit Denying Petition for Rehearing and Rehearing *En Banc*.

Justice Thomas' Order of March 29, 2001 Granting Petitioner until June 25, 2001 to File Petition for a Writ of Certiorari.

## JURISDICTION

This is a habeas corpus case, initiated pursuant to 28 U.S.C. § 2254. On December 28, 2000, the Court of Appeals for the Eighth Circuit ("Eighth Circuit") denied petitioner a certificate of appealability ("COA") following the district court's denial of his petition for a writ of habeas corpus. The district court denied the habeas petition on August 28, 2000, and denied a COA on October 2, 2000. On January 26, 2001, the Eighth Circuit also denied petitioner's request for rehearing and rehearing *en banc*. Justice Thomas granted petitioner until June 25, 2001 in

which to file the instant petition for a writ of certiorari. This Court has jurisdiction to review the Eighth Circuit's denial of a COA pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. III, § 2, cl. 2 provides in relevant part:

> In all of the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. amend. XIV, § 1 provides in relevant part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law. . . .

U.S. CONST. amend. VI, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence.

28 U.S.C. § 2254(a) provides, in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2253(c)(2) provides in relevant part:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## STATEMENT OF THE CASE

### A. Summary of Petitioner's Trial, State Court Post-Conviction Proceedings and Appeals.

A jury in the City of St. Louis, Missouri found petitioner guilty of murder in the first degree and armed criminal action in connection with the shooting death of his wife, G. Zeta Athanasiades. At trial, petitioner presented substantial evidence of two valid defenses of justification: first, self-defense, in that his wife was attempting to murder him with a butcher knife; and, second, the defense of a third party – petitioner's two-year-old son – whom petitioner was holding in his arms when his wife attacked him.

These valid defenses were rendered invalid, requiring the jury to convict petitioner consistent with the state's charges, because the state prosecutor, Mr. Nels Moss, presented a false evidentiary picture in support of a theory that petitioner shot and killed his wife after she fell on the floor. (Trial Transcript ("T.Tr.") 330-331).[1] Together with the Chief Medical Examiner of the City of St. Louis, Dr. Michael Graham, Mr. Moss supported the

---

[1] Pursuant to Supreme Court Rule 12.7, petitioner cites herein to the record before the court below.

false evidentiary picture through the knowing use of fabricated expert forensic evidence and perjured testimony. He also deliberately suppressed evidence specifically requested by the defense prior to trial that would have exposed, impeached, and refuted the false testimony that was presented against petitioner at trial.

**1. The record plainly reflects that the prosecution knowingly presented fabricated expert testimony.**

Petitioner's constitutional grievances revolve around the exit wound from the fourth of five gun shot wounds that were fired during the shooting incident. This fourth shot exited his wife's left front abdomen and reentered her left wrist, upon which she ultimately fell. Petitioner's trial testimony was that he had fired all of the shots while she was attacking him with a butcher knife, and while he was holding their infant son in his arms. (T.Tr. 1304-1322). The prosecutor's theory was that petitioner had fired the fourth and fifth shots, execution-style, after his wife fell and was lying prone on the floor. (T.Tr. 330-331).

When Dr. Graham performed the autopsy, he recorded that the exit wound from the fourth shot was "clean." As Dr. Graham testified at trial, when a bullet is exiting the body, if there is nothing on the outside of the skin pressing at the exit site, the bullet exits the skin and leaves the skin edges around the exit wound "clean," free of scrapes or abrasions. On the other hand, if there is something against the skin firm enough to support it, as the bullet is pushing its way out it crushes the skin between the bullet and whatever the supporting material

happens to be. In that case, it leaves "scrapes – abrasions" around the edges of the exit wound. Such an exit wound is called "shored" or "supported," as Dr. Graham testified. (T.Tr. 994-995). According to Dr. Graham's testimony, forensic science dictates that, if the defendant had in fact fired the fourth shot at his wife as she was laying on the floor on top of her arm, the pressure of her wrist on which she was lying against the abdominal exit would have created a shored exit wound on the abdominal wall. (T.Tr. 994-997).

Mr. Moss and Dr. Graham took advantage of the unique position in which the decedent fell on the floor, and fabricated the shored exit wound that would have been created if she had been shot in that manner. After explaining to the jury the forensic science regarding a shored wound, Dr. Graham told the jury that the abdominal exit wound was shored. (T.Tr. 995, lines 11-12.) As will be explained below, this was a fabrication. Dr. Graham then asserted the conclusion that the decedent's wrist must have been pressed against the abdominal exit during the infliction of that wound, so as to cause the shored wound. (T.Tr. 995, lines 19-21.) Dr. Graham added that it was "consistent" with this evidence for the victim to have been shot from above as she lay prone on the floor. (T.Tr. 996, lines 17-25; T.Tr. 997, lines 1-10.) Dr. Graham's trial testimony (contrary to his autopsy report) was consistent with the decedent having been on the floor when the fourth shot was fired (as the prosecutor contended), and that petitioner was guilty of first-degree murder (instead of not guilty based upon the asserted defenses). If the fourth shot had been fired while petitioner's wife was on

the floor, according to the prosecution's theory, the fatal fifth shot was too. (T.Tr. 1009).

In any case, during the second round of state post-conviction hearings conducted pursuant to Missouri Supreme Court Rule 29.15, while presenting evidence regarding his trial counsel's ineffectiveness, petitioner (acting *pro se*) was able to amass extraordinary admissions from Dr. Graham. All were made in the presence of Mr. Moss, who was representing the state at the hearing, and who had orchestrated the fabricated forensic testimony. During these hearings, Dr. Graham disclosed that when he performed the autopsy, he found the fourth shot abdominal exit wound to have been clean as opposed to shored. (PCR Tr. 157-159, of April 7, 1994 hearing; PCR Tr. 35 of July 22, 1994 hearing). In the same hearings, Dr. Graham retracted the essential conclusion upon which his shored wound opinion had been based: Dr. Graham testified that the wrist was in close proximity to decedent's body during the infliction of the wound, as opposed to being pressed up against her body. (PCR Tr. 172 of April 7, 1994 hearing.) Moreover, in the presence of Mr. Moss, Dr. Graham revealed the critical fact that he and Mr. Moss had met a few days before trial and had discussed the presentation of the shored exit wound. (PCR Tr. 157-159 & 171 of April 7, 1994 hearing; PCR Tr. 35-36 of July 22, 1994 hearing). These admissions establish that Petitioner's convictions resulted from a very serious abuse of the judicial process, and fraud upon the court and jury by judicial officers of the court.

During the second post-conviction hearings, Dr. Graham also attempted to cover up the perjury that he had committed during trial by stating that the finding of

the shored wound was based upon a photograph from the scene of the shooting, which he saw for the first time only a few days before trial. During trial, Dr. Graham had testified that he had reviewed the photographs from the scene just before he performed the autopsy, and that they accurately reflected the wounds as he saw them on the body. (T.Tr. 985-986.) When he was confronted with this testimony, Dr. Graham retracted the previous explanation: "I obviously didn't see her body at the scene so I couldn't comment on whether the photographs were accurate from the scene. *I can only tell you what I saw in the morgue.*" (PCR Tr. 28-29 of July 22, 1994 hearing) (emphasis added). Thus, while Dr. Graham has not expressly stated that be committed perjury during petitioner's trial, the admissions he made conclusively prove as much.

During trial, Dr. Graham was explicitly asked to describe his findings regarding the wounds *from having performed the autopsy*. (T.Tr. 980.) Nothing was ever said during trial about the shored wound being found in a picture taken of the scene. Indeed, at trial, the prosecutor explicitly represented to the defense expert, Dr. Charles Petty, that Dr. Graham found the shored wound by "observing and looking at the body." (T.Tr. 1568). After all, it would have been inadmissible during trial for Dr. Graham to testify to his expert findings and conclusions without having first submitted the bases for those findings. *E.g., State v. Paglino*, 319 S.W.2d 613 (Mo. 1958). Dr. Graham's belated explanation regarding the scene photograph was further perjury in an attempt to cover up the perjury that had occurred during trial. When exposed as

a second fabrication, however, it too was retracted by Dr. Graham.

To prove that Dr. Graham was again lying in an attempt to cover up the false testimony he had offered during trial regarding his finding of a "shored" wound, petitioner called one of the most respected forensic pathologists in Missouri, Dr. Jay Dix. During the second post-conviction hearings, Dr. Dix examined "Movant's Exhibit (AA)," the scene photograph that Dr. Graham had supposedly relied upon for his finding of a shored wound. Dr. Dix testified that the exhibit depicted a clean exit wound. Dr. Dix further explained that if there had been any scrapes around the edges of the wound, they would not have disappeared as Dr. Graham claimed – they would have been there when the autopsy was performed. (PCR Tr. 50-52, of July 22, 1994 hearing.)

Dr. Dix ultimately concluded to a scientific level of certainty that the decedent was upright when the last two shots were fired. (PCR Tr. 55-56, 80, of July 22, 1994 hearing). The evidence upon which he reached this conclusion included the fact that the abdominal exit wound was not shored, (which it would have been if the decedent had been shot in the manner the prosecution contended). It also included a photograph taken at the scene, depicting the last entry wound below the decedent's left shoulder, with blood running straight down to her waist. The blood would have run to the side if she had been lying on the floor when shot. It included the fact that there was no gunshot residue on the back of her shirt, which would have necessarily been there if she had been shot from above as she laid prone on the floor.

In addition to presenting the false shored wound evidence from Dr. Graham, the prosecutor had used a morgue photograph depicting the abdominal exit wound to mislead defense expert Dr. Charles Petty at trial into conceding Dr. Graham's theory that the victim was shot while on the floor:

Q. [By Mr. Moss]. Isn't that a shored wound, a shored exit wound here and shored wound there?

A. [By Dr. Petty]. I can't tell, as I indicated from looking at the photograph before, that this is a shored wound in the abdomen. A shored wound refers to a wound of exit, not a wound of entrance. And the wound in the forearm is certainly a wound of entrance because the bullet was recovered there.

Q. Okay. If Dr. Graham said he observed the body, he looked at the body and if he said it was a shored wound, you wouldn't disagree with that, would you?

A. He did not indicate that in his report. No, I would not disagree with him had he so indicated it.

Q. And if he said that the wound to the wrist was consistent with the person's left wrist being pressed up against the person's body when that bullet exited the abdomen, you wouldn't disagree with that either?

You wouldn't disagree with it if he said that the left wrist – that it was consistent that the left wrist was pressed against the chest at the point of the exit from the chest?

A. I would not disagree with it's consistent with that and consistent with other things.

Q. It's also consistent with the left wrist being pressed up against the body with the body laying on the floor.

A. It's consistent with that as well as other things, yes, sir. [T.Tr. 1567-1568.]

The shored wound was critical to the prosecution's case, and the prosecutor compounded the due process violations in his closing argument to the jury:

> Now we talked about, we talked about what really happened here. What really happened here. One thing that doesn't lie for sure in this case is the physical evidence. Some people may try to lie about it, which is exactly what the defendant did. * * * Because Dr. Graham who doesn't stretch the truth, said it is consistent with her left wrist being under her body right where the bottom of your ribs are, because *it's a shored wound*. Wounds are different as both doctors told you. *Even Dr. Petty said well, her wrist had to be up against her chest. Even he would have to admit that*. But if you look at the pictures of her and her chest in the *morgue*, you can see the red around there. So she was lying down, unless you assume, of course, after being shot a number of times, of course, she is wandering around like this, tucking her wrist in, pressing it tight enough so that is supports it when the bullet comes through. [(T.Tr. 1719-1720) (emphasis added).]

The fabricated shored wound and the false conclusion reached as a result of this fabricated evidence infected the entire proceeding with constitutional error of the

highest magnitude. The significance of the shored wound was aptly noted by the trial judge, who stated towards the end of trial: "You've talked about the shored wound six thousand million times in this trial." (T.Tr. 1615-1616).

**2. The prosecution's suppression of the scheme and the resulting ineffectiveness of defense counsel.**

Prior to trial, the defense filed a motion for disclosure pursuant to Missouri Supreme Court Rules 25.03 and 25.08. Among other things, the defense specifically requested disclosure of "any statements of experts made in connection with this particular case." In response, and with respect to Dr. Graham's statements, the prosecutor disclosed the autopsy report previously issued by Dr. Graham, which described the abdominal exit wound as being "clean," but suppressed the fact that there was pre-trial collusion and that Dr. Graham was going to contradict his autopsy report at trial and testify that the fourth shot wound was shored. Unaware of the unfolding plot, counsel was rendered unprepared to expose the deception. This fact is especially evident from *defense* counsel's cross-examination of Dr. Graham on the issue of the shored wound:

> Q. Now you were asked about the entrance into the wrist, if this young lady were on the floor and she was laying on her arm, would that cause pressure on the exit wound, the exit wound from the body before it gets into the wrist? Do you understand what I'm saying?

A. Yes, the weight of the body would press the rib cage exit site onto the wrist.

Q. And what would that cause? What kind of a – what would you expect that kind of pressure, what effect would that have on the exit wound and the entrance wound into the wrist?

A. It will often cause what's called the supported exit where there is some scraping around the edges of the exit.

Q. And did you find that?

A. Yes. [T.Tr. 1020-1021.]

During the first post-conviction hearings, trial counsel testified that he knew at the time he cross-examined Dr. Graham that the official autopsy report stated that the abdominal exit wound was a clean wound, and that he understood a "clean" wound to be the exact opposite of a shored wound. (PCR Tr. 100-1001, of January 23, 1992 hearing). Counsel also testified that the shored wound was the key evidence in support of the prosecution's theory that his client was guilty of murder in the first degree. (PCR Tr. 97, of January 23, 1992 hearing). He testified that it was his goal to disprove the shored wound. (PCR Tr. 84, of January 23, 1992 hearing). But in his cross-examination of Dr. Graham, trial counsel did not question the prosecution expert's fabricated conclusion, but instead confirmed it:

Q. [By counsel] You were asked about the entrance into the wrist. If this young lady were on the floor and she was lying on her arm, would that cause pressure on the exit wound, the exit wound from the body

before it gets into the wrist? Do you understand what I'm saying?

A. [By Dr. Graham] Yes, the weight of the body would press the rib cage exit site on to the wrist.

Q. And what would that cause? What kind of a – what would you expect that kind of pressure, what effect would that have on the exit wound and the entrance wound into the wrist?

A. It will often cause what's called the supported exit where there is some scraping around the edges of the exit.

Q. And did you find that?

A. Yes. [T.Tr. 1020-1021.]

When petitioner's post-conviction hearing counsel questioned trial counsel as to why he did not impeach Dr. Graham with the autopsy report, trial counsel testified that he did not want to get back into it, and have the jury again hear about the shored wound and why the decedent had been shot while on the floor. (PCR Tr. 104-105, of April 23, 1994 hearing). But during the second hearings, trial counsel admitted that he in fact re-emphasized this false evidence, and that his cross-examination of Dr. Graham was the functional equivalent of prosecuting his own client with fabricated evidence. (PCR Tr. 90-91, of December 8, 1994 hearing). Clearly, petitioner's trial counsel was constitutionally ineffective. He also failed to present the available evidence (including that later provided by Dr. Dix) that would have corroborated defendant's trial testimony that petitioner shot his wife in self-

defense and the defense of his son. (PCR Tr. 55-56, 80, of July 22, 1994 hearing).

The prejudicial effect of the false shored wound testimony cannot be overstated. It was adduced on direct and cross-examination of Dr. Graham, and from defense expert Dr. Petty who had been misled by the prosecutor. It permeated the entire proceeding, including the closing argument of the prosecution. If the jury believed that the defendant shot his wife as she laid helpless on the floor, his valid defenses were destroyed, and the jury would have been required to find him guilty as charged. That is exactly what happened.

**3. The prosecution's conduct deprived petitioner of any review.**

Incredibly, the state trial and appellate courts disallowed the petitioner any form of a hearing on the most serious constitutional violations now before this Court. Indeed, Mr. Moss persuaded the trial judge to grant a motion for change of judge as of right in the state post-conviction relief proceedings, a move the Missouri Court of Appeals later held to be reversible error. *State v. Athanasiades*, 857 S.W.2d 337, 341-43 (Mo. Ct. App. 1993). Mr. Moss then convinced the transferee judge to deny petitioner an evidentiary hearing on his claim concerning subornation of perjury in connection with the "shored" wound testimony by saying: "Do you think for a minute that I would ever testify that I knew that I was putting on false testimony or had somebody deliberately change their testimony?" (T.Tr. 35-36 (December 6, 1991 Pre-hearing Conference)).

In its finding of fact and conclusions of law, the (transferee) hearing court found that prosecutorial misconduct was more properly reserved for direct appellate review. Petitioner raised the subornation of perjury claim on direct appeal. The state courts affirmed petitioner's convictions on direct appeal without any consideration of this issue and remanded the case to the original (transferor) trial judge for consideration of petitioner's post-conviction claims, but limited the claims that could be considered to those concerning ineffective assistance of counsel. *See Athanasiades*, 857 S.W.2d at 343. Thus, the prosecutor's actions in convincing the first (transferee) judge not to hear the subornation of perjury claims insulated them from review. Petitioner did obtain during the second hearings, however, the evidence that demonstrates he was convicted through the known use of false evidence and the suppression of the false evidence.

This federal challenge to petitioner's convictions and sentences followed.

**B. Federal Habeas Corpus Proceedings.**

In 1996, petitioner filed a habeas corpus action pursuant to 28 U.S.C. § 2254 attacking his state conviction of murder in the first degree and of armed criminal action, and consecutive sentences of life imprisonment without eligibility for probation or parole and of twenty-five years, meted out by the Circuit Court of the City of St. Louis. He raised in the district court all of the claims raised in this petition.

On January 21, 2000, after more than three years before a United States Magistrate Judge, to whom the

district court referred the matter, and after three orders to respondent to show cause, the magistrate judge issued a report and recommendation calling for the denial of relief to petitioner. (App. 4-App. 29).[2] On August 28, 2000, the district court issued its order and judgment summarily sustaining, adopting, and incorporating the magistrate judge's report and recommendation, and summarily denying all relief. (App. 2-App. 3). In conformity with 28 U.S.C. § 2253(c)(2) and FED. R. APP. P. 22(b), the district court did not *sua sponte* grant or deny a COA. Petitioner therefore interposed an application for a COA. The same was denied on October 2, 2000. (App. 30-App. 31). A panel of the Eighth Circuit similarly and summarily denied appealability on December 28, 2000 (App. 1), and the Eighth Circuit denied rehearing and rehearing *en banc* on January 26, 2001 (App. 32). This petition follows.

## REASONS FOR GRANTING THE WRIT

In *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), this Court declared: "when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." This is such a case. As indicated, petitioner's convictions resulted from corrupt abuse of judicial process by judicial officers of the court.

[2] "App." refers to the appendix required by Supreme Court Rule 14(i), which is bound herewith.

The record establishes that the prosecuting attorney conspired with the medical examiner before trial to invent evidence in order to obtain petitioner's convictions, and, then, through misrepresentations and other maneuvers, deprived petitioner of the ability to air his constitutional grievances relating to the false evidence in the trial court, the post-trial hearing courts, or on appeal.

Here, the prosecution found a way to circumvent *Brady v. Maryland*, 373 U.S. 83 (1963), in keeping suppressed the plot to present fabricated expert testimony, by simply disclosing in advance of trial the expert's report refuting the fabrication. This Court should make clear to the courts below that such conduct violates *Brady* and is not sanctioned.

Furthermore, the circumstances of this case reveal that the courts below so far departed from the accepted and usual course of judicial proceedings, that the exercise of this Court's supervisory power is required.

### A. Questions 1: The Prosecution Violated *Brady* By Concealing the Scheme to Present False Evidence.

The record of this case reflects that, despite a timely motion for disclosure by the defense pursuant to *Brady* and the Missouri Supreme Court Rules, in which the defense specifically requested information regarding, *inter alia*, any statements of experts made in connection with the particular case, and despite an order by the trial court to disclose the information, the prosecutor deliberately and fraudulently suppressed the scheme he had devised with Dr. Graham to present fabricated forensic

evidence in support of the state's false theory of prosecution. Moss did disclose the autopsy report – which described the critical fourth shot wound as being "clean." He suppressed, however, the fact that Dr. Graham was going to testify inconsistently with it.

The district court[3] below indicated that petitioner failed to state a *Brady* claim stating that Mr. Moss "had no obligation to disclose the testimony," and " 'where the prosecution delays disclosure of the evidence, but the evidence is disclosed during trial, *Brady* is not violated,' *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996)." (App. 13-App. 14).

*Gonzales* does not support the district court's statement. It was a federal drug conspiracy case. Disclosure was governed by the Jencks Act rather than under *Brady*. 90 F.3d at 1369 n.4. Petitioner's case was governed by *Brady*, petitioner made a specific pretrial request for disclosure, and the court ordered the prosecutor to disclose. Here, the delay of "fabricated inculpatory evidence" which was unexpectedly introduced in the middle of the trial rendered the defense unprepared to show it false.

In *Strickler v. Greene*, 527 U.S. 263, 282 n.21 (1999), this Court made clear that even if the evidence is inculpatory on its face, its disclosure is mandated under *Brady*, if it can be used to impeach a prosecution witness. The rationale of *Strickler* applies here with equal vigor. Similarly,

---

[3] The district court adopted *in toto* the report of the magistrate judge. (App. 2-3). Petitioner refers herein to the "district court" as including the magistrate judge's report and recommendation which the district court adopted.

in *United States v. Bagley*, 473 U.S. 667, 683 (1985), this Court explained that one must evaluate a *Brady* claim with a view toward how the defense could have been but for the violation:

> the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

In this case, the prosecutor's deliberate suppression violated *Brady*.

Moreover, under *United States v. Agurs*, 427 U.S. 97, 106 (1976), even without a specific request, the prosecutor must decide what, if anything, he should volunteer to the defense *before trial*. It necessarily follows, that if – as was the case here – there is a specific request for disclosure, the prosecutor was obligated to disclose the information before trial.

In finding no *Brady* violation, the district court relied on the fact that counsel had the autopsy report and heard Graham's testimony during trial. It reasoned that counsel had ample opportunity to cross-examine Graham and put on his expert. (App. 13). Such analysis does not comport with established law. What the prosecution did was not disclosure at all; it certainly did not satisfy *Brady*. It was

an ambush. Petitioner had no opportunity in this case to prepare for the false (and fabricated) inculpatory evidence because of the state's fraudulent suppression. *Brady* was violated.

At an absolute minimum, reasonable jurists, including the reasonable jurists who decided *Brady*, *Strickler*, and *Bagley* would find the district court's rejection of petitioner's claim wrong or debatable. In 28 U.S.C. § 2253(c), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Congress has authorized appeals of denials of relief under 28 U.S.C. §§ 2254 and 2255 when "the applicant has made a substantial showing of the denial of a constitutional right."

In *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), this Court has recently summarized the test for granting a COA, and has applied it to situations – like this case – in which a denial of relief is based upon an asserted procedural default:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a

> valid claim of the denial of a constitutional right and jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

The reasonable jurists who decided *Agurs* expected prosecutors to provide some disclosure in advance of trial even in the absence of a request for it; in this case, the defense had expressly requested the material – which included Dr. Graham's new statement that the key exit wound was allegedly shored.

### B. Question 2: Petitioner Established Cause to Lift Any Procedural Default With Regard to His *Brady* Claim as a Result of the Prosecutor's Conduct.

The district court found that petitioner failed to show cause to lift a procedural bar to claims relating to the prosecution's fraudulent suppression in violation of *Brady*, Mo. S. Ct. R. 25.03 and 25.08, and the state trial court's order to disclose. (App. 11-App. 14). Although exercising due diligence, petitioner did not learn of the bases for his *Brady* claim, as explained above, until years after trial (in the post-conviction hearing after remand concerning ineffective assistance only), and until after petitioner was without any remedy in the state courts. Such circumstances constitute cause under this Court's established precedent.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court stated:

> We explained clearly that "cause" under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him: "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."

*Id.* at 753 (emphasis in original; quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Here, because the prosecutor deliberately suppressed the fact that Dr. Graham was going to fabricate a shored exit wound, Dr. Graham's testimony regarding the source and origin of this testimony came too late, and thus rendered defense counsel unprepared to discover the falsity. The suppression not only prevented counsel from apprising the jury of the state's fraud against the defendant, the court and the jury, but also rendered counsel unaware of the fraud. The suppression also deprived petitioner of any state court review. Under these circumstances, the prosecutor's deliberate concealment constitutes a factor external to the defense, and cause to lift any procedural default.

At a minimum, under the standards announced by this Court discussed above, reasonable jurists would disagree with the lower court's procedural ruling on this claim for relief, and the Eighth Circuit should have granted a COA.

### C. Question 3: The Magistrate Judge's Assertion of a Procedural Bar to Petitioner's Subornation of Perjury Claim was Erroneous.

The district court *sua sponte* found that petitioner procedurally defaulted his claim for relief relating to the prosecution's deliberate presentation of false evidence, because he did not timely raise it in the motion for new trial. (App. 9-App. 10).

However, the asserted procedural rule is inadequate for two reasons. First, it does not promote a legitimate state interest. As this Court put it in *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965), "a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *See also, e.g., Rickman v. Dutton*, 864 F. Supp. 686, 706 (M.D. Tenn. 1994) (state "simply has no legitimate interest in presenting false testimony and *withholding* relevant evidence to convict [a] defendant" (emphasis added)).

The State of Missouri has made subornation of perjury a crime. § 575.040, R.S. Mo. Petitioner is not the only victim; the state itself is a victim, as articulated in *Mooney v. Holohan*, 294 U.S. 103 (1935). The state can have no interest in perpetuating the fundamental miscarriage of justice that has been committed against one of its citizens. *See Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (procedural bar may not be interposed when fundamental miscarriage of justice has occurred). Indeed, no state court ever relied on the asserted procedural rule; the district court – actually the magistrate judge – did so on its own. (App. 9).

Second, in *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) this Court also noted that a "state procedural rule is not 'adequate' unless the procedural rule is 'strictly or regularly followed.' " (citations omitted). Under Missouri law, similar claims that were not presented in a motion for new trial, are often reviewed on the merits under plain error review. *See State v. Weiss*, 24 S.W.3d 198 (Mo. Ct. App. 2000). Accordingly, while the rule is firmly established, it is not regularly followed. Most significantly, however, petitioner *did* present this subornation of perjury claim to the state court on direct appeal. (Supp. App., Vol. X at 63).[4] This Court has long held that "once the federal claim has been presented to the state courts, the exhaustion requirement is satisfied." *Picard v. Connor*, 404 U.S. 270, 275 (1971). While the state appellate court did not address the claim, that does not matter for purposes of a petitioner's exhaustion requirements. *Smith v. Digmon*, 434 U.S. 332, 333-34 (1978) ("exhaustion . . . cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim"). In the instant case, the state appeals court did not say whether it was relying upon a state-law procedural bar or not; it ignored the claim altogether. In sum, under the

---

[4] Moreover, although the subornation of perjury claim was not timely raised in a motion for new trial, petitioner substantially complied with the requirements of the rule when, acting *pro se*, petitioner filed additional suggestions in support of the motion for a new trial raising the subornation of perjury claim. Petitioner also raised timely the claim during allocution, during the state post-conviction relief proceedings, and on direct appeal. No state court ever considered the claim on the merits or found that the claim was defaulted. The magistrate judge, however, found *sua sponte* that the claim was defaulted.

circumstances of this case, the state law ground invoked by the magistrate judge cannot be treated as adequate.

At minimum, the reasonable jurists who decided *Mooney v. Holohan*, *Henry v. Mississippi* and *Johnson v. Mississippi*, would differ with the district court's tolerance of the enforcement, in federal court, of a state-law procedural bar when the effect of the official wrongdoing in question was to conceal it from judicial scrutiny within the time limits created by strict conformity with state law. The reasonable jurist who decided *Rickman v. Dutton*, would find not even debatable – but just plain wrong – that a federal court would enforce a state-law procedural bar when it did not promote the timely airing of claims by convicted persons but, rather, "deceptive activities which enable[ ] the State to circumvent the Constitution."

Finally, the assertion of a procedural default for the first time by federal magistrate judge was a violation of the very principle of federalism for which all of the rules of procedural default, leading to unjust results, are said to exist. Assertion of this supposed default also violates mandatory precedent of this Court, *Harris v. Reed*, 489 U.S. 255, 261-62 (1989), in that the last state court in which the claim was presented did not rely on a procedural bar in rejecting it.

## D. Question 4: Petitioner's Claims of Ineffective Assistance of Counsel.

### 1. Petitioner's counsel was constitutionally ineffective in failing to refute the fabricated shored wound evidence, and in failing to present critical evidence corroborating the defendant's trial testimony.

Trial counsel failed to use the official autopsy report previously issued by Dr. Graham in order to impeach his fabricated expert testimony to a "shored exit wound" in support of the prosecution's theory that petitioner fatally shot his wife as she laid helpless on the floor, prone. The fabricated shored wound gutted the heart of petitioner's defenses. This specification of ineffective assistance of counsel involves not only counsel's failure to expose Dr. Graham's testimony as a fabrication, but also counsel's admission during the post-conviction hearings that he re-elicited the same on cross-examination against his own client, with more impetus, clarity, and prejudice than the prosecutor achieved on direct. The district court erroneously rejected the claim. (App. 20-App. 21).

Trial counsel testified that he knew that Dr. Graham's trial testimony was squarely refuted by the autopsy report. (PCR Tr. 90-91, of December 8, 1994 hearing). In light of this admission by trial counsel, the petitioner has demonstrated that counsel deprived him of a fundamental constitutional right in addition to the right to be free from the ineffective assistance of counsel. It also deprived him of the fundamental constitutional right to present a

complete defense.[5] *E.g.*, *Crane v. Kentucky*, 476 U.S. 683 (1986); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). After the combined violations by Mr. Moss, Dr. Graham, and trial counsel, there was no defense at all in petitioner's case.

In *Williams v. Taylor*, 529 U.S. 362, 374 (2000), this Court reiterated the substantive standard under which the petitioner deserved to have his claim considered:

> It is, of course, well settled that the fact that constitutional error occurred in the proceedings that led to a state-court conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. *See, e.g., Stone v. Powell*, 428 U.S. 465 . . . (1976); *Brecht v. Abrahamson*, 507 U.S. 619 . . . (1993). On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ.

Here counsel admitted that he prosecuted his own client, by eliciting fabricated expert testimony against him that destroyed his defense. There can never be a greater fundamental unfairness in a criminal proceeding. Nor can there be an error by counsel more serious than the one described here.

---

[5] Petitioner submits that defense counsel was truly rendered ineffective as a direct result of the state's fraudulent suppression. If, however, counsel actually knew during the trial that the autopsy report refuted Dr. Graham's fabricated shored wound testimony, then counsel effectively joined with the state in the presentation of the fabricated evidence. Either way, petitioner's constitutional rights were violated.

**2. Trial counsel failed to present critical evidence corroborating the defendant's trial testimony.**

In addition, trial counsel failed to present critical evidence that was available to him to corroborate petitioner's testimony that he fired the shots in the defense of himself and his son. Dr. Dix's testimony in the post-conviction hearings, outlined above, corroborated petitioner's trial testimony and the fact that petitioner's wife was not on the ground when the shots were fired.

The trajectory angles of the last two shots in conjunction with the blood smeared on the hallway floor shows that the decedent was in pursuit of petitioner during the firing of the last two shots, and further demonstrates how the last two shots were fired. Dr. Dix testified that the evidence with regard to the last two shots, in conjunction with the blood being smeared on the floor, when compared to the defendant's trial testimony (T.Tr. 1320-1322, and 1372-1376), showed that it was inconsistent with the state's theory of the case, while consistent with the defendant's testimony, and that it was petitioner that was being pursued by his wife during the last two shots. (PCR Tr. 62-66 of July 22, 1994 hearing).

Forensic pathologist Dr. Charles Petty testified during the second post-conviction hearings that, after he examined the scientific evidence in the case, the evidence refuted the prosecution's theory of the case and supported the defendant's trial testimony. (PCR Tr. 308-341 of April 8, 1994 hearing).

In the PCR hearings on remand, even the state's expert, Dr. Graham, after examining the trajectory angles

of the last two shots in conjunction with other related scientific evidence, agreed that the evidence was consistent with the petitioner's trial testimony. (PCR Tr. 187-190 of April 7, 1994 hearing).

Petitioner's counsel was constitutionally ineffective. At minimum, reasonable jurists could disagree about whether petitioner's trial counsel was ineffective. The Eighth Circuit erred in failing to grant COA on this issue.

## CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BARRY A. SHORT
*Counsel of Record*

LEWIS, RICE & FINGERSH, L.C.
500 N. Broadway, Suite 2000
St. Louis, Missouri 63102-2147
Telephone: (314) 444-7600
Facsimile: (314) 241-6056

*Counsel for Petitioner*

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 00-3553EMSL

| | | |
|---|---|---|
| Michael Athanasiades, Appellant, | * | Appeal from the United States District Court for the Eastern District of Missouri |
| vs. | * | |
| Michael Bowersox, Appellee. | * | 4:96CV730TIA |

Before BEAM, FAGG, and HANSEN, Circuit Judges

**JUDGMENT**

(Filed Feb. 5, 2001)

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

December 28, 2000

A true copy.
ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| MICHAEL ATHANASIADES<br>Plaintiff,<br>vs.<br>MICHAEL BOWERSOX and<br>JEREMIAH W. (JAY) NIXON<br>Defendant. | ) | Case No.<br>4:96CV730 CEJ<br>TIA |

**ORDER**

(Filed Aug. 28, 2000)

This matter is before the Court on the petition of Michael Athanasiades for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Pursuant to 28 U.S.C. § 636(b), this matter was referred to United States Magistrate Judge Terry I. Adelman. On January 21, 2000, Judge Adelman issued a Report and Recommendation recommending that the Court deny the petition for a writ of habeas corpus. The petitioner has filed objections to the Report and Recommendation.

Following a *de novo* review,

IT IS HEREBY ORDERED that the Report and Recommendation of United States Magistrate Judge Terry I. Adelman is sustained, adopted, and incorporated herein.

**IT IS FURTHER ORDERED** that the motion of Michael Athanasiades [#1] for a writ of habeas corpus is **denied**.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT
JUDGE

Dated this 28th day of August, 2000.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| MICHAEL ATHANASIADES, Petitioner, | ) | No. 4:96CV730 CEJ (TIA) |
| v. | ) | |
| MICHAEL BOWERSOX[1], Respondent. | ) | |

## REPORT AND RECOMMENDATION

(Filed Jan. 21, 2000)

This matter is before the Court on the petition of Michael Athanasiades for a writ of habeas corpus. The case was referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b).

### Procedural History

On May 20, 1989, petitioner shot his wife to death. She sustained five bullet wounds, two of which were in her back. Petitioner claimed that he shot his wife in self-defense after she attacked him with a knife. On August

---

[1] Named Respondent, Michael Bowersox is the Superintendent of Potosi Correctional Center and is thus a proper party respondent. 28 U.S.C. § 2254, Rule 2(a). Because petitioner also challenges a consecutive sentence to be served in the future, Missouri Attorney General Jeremiah W. (Jay) Nixon should be added as a proper party respondent. 28 U.S.C. § 2254, Rule 2(b). Future pleadings should reflect this change in the caption.

18, 1990, after a trial by jury, petitioner was convicted of first degree murder and armed criminal action. The Circuit Court for the City of St. Louis, Missouri sentenced petitioner to life without possibility of parole and twenty-five years to be served consecutively. Petitioner is currently serving his sentences at the Potosi Correctional Center located in Potosi, Missouri.

Petitioner filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. (Pet. Exh. B) After an evidentiary hearing, the motion court denied petitioner's Second Amended Motion. (Pet. Exh. C) Petitioner then filed a consolidated appeal in which he appealed his conviction and the denial of his 29.15 motion. On May 11, 1993, the Missouri Court of Appeals affirmed petitioner's conviction and sentence. With regard to the denial of petitioner's motion for post-conviction relief, the court affirmed in part and reversed in part and remanded with directions. *State v. Athanasiades*, 857 S.W.2d 337 (Mo. App. 1993). On remand, petitioner's 29.15 motion was denied, and the Missouri Court of Appeals affirmed. (Pet. Exh. D, E) Petitioner also filed two Motions to Recall the Mandate, claiming ineffective assistance of appellate counsel and prosecutorial misconduct, respectively. (First Amended Petition, p. 11; Pet. Exh. G) These motions were also denied.

On April 16, 1996, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 in federal court. After retaining counsel, petitioner filed his first amended petition on December 6, 1996, raising five grounds for habeas relief. On July 22, 1997, petitioner dismissed grounds two and four of the petition.

**Petitioner's Claims**

(1) Petitioner's convictions and sentences resulted from the denial of due process of law in violation of the Fourteenth Amendment in that the state contrived petitioner's convictions through the known use of fabricated evidence and perjured testimony and deliberately suppressed evidence that would have impeached and refuted the testimony given against him;

(3) Petitioner was deprived of a fair trial and due process of law in violation of the Sixth and Fourteenth Amendments because the prosecutor knowingly presented false serology evidence concerning the blood on the knife seized at the scene and failed to disclose the fact that the knife handled was not conducive to fingerprints; and

(5) Petitioner was deprived of the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments in that trial counsel made errors so serious that the entire proceeding was rendered fundamentally unfair and the verdict suspect, to wit:

(a) Trial counsel failed to impeach Dr. Graham's false expert testimony in support of the state's theory that petitioner's wife was shot while lying on the floor;

(b) Trial counsel failed to point out the absence of gun shot residue on the back of victim's shirt;

(c) Counsel failed to present evidence and argue that the evidence concerning the last

shot was inconsistent with the state's theory of the case, while consistent with petitioner's testimony;

(d) Counsel failed to present evidence and argue that the trajectory angles of the last two shots were inconsistent with the state's theory of the case while consistent with the petitioner's testimony that the shots occurred while the victim was attacking him;

(e) Counsel allowed misleading defense expert testimony to alter the entire evidentiary picture and have a devastating effect on the petitioner's defense;

(f) Counsel was ineffective in that he allowed the introduction of inadmissible and highly prejudicial evidence concerning petitioner's prior assault on his wife and their unborn child; and

(g) The state court erroneously applied constitutional law concerning the prejudice component of the *Strickland* test.

In response to the petition, respondent contends that petitioner's first two claims should be dismissed because petitioner procedurally defaulted his claims in state court and has failed to show cause and prejudice or actual innocence to excuse such default. Further, respondent asserts that petitioner's claims of ineffective assistance of counsel are without merit.

## Exhaustion Analysis

Before the undersigned may consider the merits of the petition for a writ of habeas corpus, the petitioner must demonstrate that he has exhausted his state court remedies. 28 U.S.C. § 2254(b). Here, petitioner has exhausted all of his state court remedies by either fairly presenting his claims to the Missouri state courts or by procedurally defaulting on the state remedies available to him.

## Claim One

Petitioner first argues that his conviction and sentences resulted from the denial of due process of law in violation of the Fourteenth Amendment because the state contrived petitioner's convictions through the known use of fabricated evidence and perjured testimony and deliberately suppressed evidence that would have impeached and refuted the testimony given against him. This claim contains two separate legal issues. Petitioner first contends that the prosecutor knowingly used perjured testimony from the coroner, Dr. Graham. He also claims that the state failed to disclose impeachment evidence regarding this witness. Respondent maintains that petitioner procedurally defaulted on both aspects of this claim by not raising the claim on direct appeal. Respondent thus argues that the claim is barred from federal review.

The undersigned agrees that this claim is procedurally defaulted. While petitioner did raise this claim on appeal, he raised it as an appeal to point qq in his Second Amended Rule 29.15 Motion. In fact, petitioner references this in his first ground of the First Amended

Petition for a Writ of Habeas Corpus. (Pet. p. 13) The Missouri Court of Appeals declined to review this claim of error relating to his post-conviction motion because petitioner failed to plead sufficient facts to support his contention. *State v. Athanasiades*, 857 S.W.2d 337, 342 (Mo. App. 1993). This constitutes a procedural bar to review because petitioner failed to satisfy state procedural requirements that he plead sufficient facts to support his claim. *See Smith v. Groose*, 998 F.2d 1439, 1441 (8th Cir. 1993) (finding that petitioner's failure to plead sufficient facts in his motion for post-conviction relief was a failure to satisfy state procedural requirements which served as an adequate and independent state procedural bar to federal review).

However, petitioner claims that his first ground was raised as a direct appeal, not an appeal of his Rule 29.15 motion. Even if the undersigned accepted this as true, petitioner's first claim is still procedurally barred. The record shows that petitioner raised this claim as his second ground on appeal. (Resp. Exh. C, p. 63) However, this claim was not raised in petitioner's motion for a new trial. (See Resp. Exh. A, pp. 168-186; 191-195; 197-198; 212-213). Under Missouri Supreme Court Rule 29.11(d), "allegations of error to be preserved for appellate review must be included in a motion for new trial . . . " If this claim were reviewable at all, it would only be for plain error. *State v. Santillan*, 1 S.W.3d 572 (Mo. App. 1999). However, the Missouri Court of Appeals did not give petitioner's claim plain error review and instead interpreted it as an appeal of the motion court's denial of petitioner's post-conviction motion.

Because petitioner failed to raise either aspect of his first claim pursuant to applicable state procedural rules, the entire claim is procedurally defaulted. *Malone v. Vasquez*, 138 F.3d 711, 716 (8th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 384 (1998) (citations omitted); *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (citation omitted). This Court may not reach the merits of his claim unless the petitioner can show cause and prejudice for the default or demonstrate a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). "Establishing cause requires a showing of some external impediment that frustrates a prisoner's ability to comply with the state procedural rules." *Malone*, 138 F.3d at 719. Examples of such cause include a showing that a factual or legal basis for a claim was not reasonably available to counsel, or that interference by officials makes compliance impracticable. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citation omitted). The miscarriage of justice exception applies only in extraordinary cases, particularly if a constitutional violation resulted in the conviction of an innocent person. *Murray*, 477 U.S. at 496; *Schlup*, 513 U.S. at 327. This standard requires petitioner to persuade the court that in light of new evidence no juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 329; *Perry v. Norris*, 107 F.3d 665, 666 (8th Cir. 1997).

The miscarriage of justice exception requires petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Schlup*, 513 U.S. at 324. The Supreme Court noted

in *Schlup* that claims of actual innocence are rarely successful because of this type of evidence is usually unavailable. *Id.*

Petitioner asserts that he can show cause and prejudice for his procedural default.[2] With regard to both aspects of his claim, that the prosecutor knowingly used perjured testimony of Dr. Graham and that he failed to disclose impeachment evidence regarding Dr. Graham in violation of *Brady*, petitioner argues that he obtained new evidence that was discovered during the second post-conviction hearings. Specifically, petitioner states that Dr. Graham revealed that he met with the prosecutor, Nels Moss, shortly before trial to review the photographs of the victim's body taken at the scene. Dr. Graham and Mr. Moss discussed issues such as the position of her body during the shots, the "shored" exit wound, and whether the victim was shot while lying on the floor. Petitioner further asserts that Dr. Graham revealed that Mr. Moss was aware that Dr. Graham would testify inconsistently with the autopsy report, despite that fact that Mr. Moss testified during the hearings that he was not aware that Dr. Graham would testify to the finding of a "shored" versus a "clean" exit wound.

Dr. Graham's autopsy report revealed that the fatal shot was a clean wound. However, he testified during trial that the wound was shored, which could possibly indicate that the victim was shot while lying prone on the floor. (Pet. Exh. L., p. 1004) He admitted, however, that

---

[2] In order to properly address petitioner's cause and prejudice arguments, some discussion of the merits will be necessary.

there were other possibilities regarding her body position when shot. (Pet. Exh. L., pp. 1004-1005; 1011) He later testified that he reached this conclusion from a photograph taken at the scene, but that he still believed that all indications were that she was shot while lying down based upon a number of factors. (Pet. Exh. R, pp. 158-59; Exh. S, p. 40)

Respondent asserts that petitioner had all the necessary evidence to impeach Dr. Graham at the time of trial. The undersigned agrees that petitioner had the autopsy report, and he heard the testimony of Dr. Graham. To the extent that these were inconsistent, petitioner's counsel had the opportunity to cross-examine Dr. Graham. Further, petitioner had his own expert to refute the testimony of Dr. Graham. (Pet. Exh. N, pp. 1507-1516; 1527-1615) Dr. Petty testified that the nature of the exit wound and the shirt the victim was wearing did not support the state's theory that the victim was lying down when shot. (Pet. Exh. N, pp. 1533-1537)

Petitioner's theory that Dr. Graham gave false testimony and later recanted does not rise to the level of evidence not available to petitioner at the time of trial. Dr. Graham's testimony was consistent at all of the hearings. He testified during the April hearing that he believed during trial that the photo reflected a "shored" wound at the time of the incident and that the scrape may have vanished by the time he performed the autopsy because the edges of the wound began to dry. (Pet. Exh. R, pp. 157-158) Upon further reflection four years later, after observing a greatly enlarged photograph of the wound, he may have expressed some doubts. However, he was still "not convinced it's not there . . . " (Pet. Exh. S,

p. 22) Dr. Graham maintained throughout that he believed at the time of trail that the photograph depicted a shored exit wound. (Pet. Exh. R, pp. 157-59; Exh. S, p. 22) He further consistently indicated that his conclusion that the victim was possibly shot while lying down was based on other evidence aside from the shored exit wound. (Pet. Exh. Exh. R, pp. 159, 164, 173-175; Exh. S, pp. 40-41) Accordingly, Dr. Graham did not later retract his testimony as petitioner submits. Therefore, petitioner has not provided this Court with information that was not available to counsel at the time of trial, and he is unable to demonstrate cause. *See Bowman v. Gammon*, 85 F.3d 1339, 1345 (8th Cir. 1996) (finding "factual basis of [petitioner's] claim concerning the autopsy evidence was reasonably available to him at the time of trial. Thus, [petitioner] should have presented this claim to the state court.")

With regard to his Brady argument, again petitioner cannot demonstrate cause. He maintains that the information that Dr. Graham was going to testify contrary to his autopsy report was not readily available to counsel and should have been disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner had the information at the time that he should have filed a motion for new trial. He had the autopsy report, and he heard the testimony of Dr. Graham. He had ample opportunity to cross-examine Dr. Graham and to put on his own experts. Further, the prosecutor had no obligation to disclose the testimony. The government is required to provide defendant with any evidence in its possession which is favorable to the defendant and which is material to the guilt or innocence of the defendant or to punishment. *Brady*, 373 U.S. at 87.

This includes evidence which may be used to impeach the testimony of government witnesses. *United States v. Bagley*, 473 U.S. 667 (1985). However, in the instant case, the impeachment evidence was the autopsy report, which petitioner had in his possession. In addition, the fact that the witness was going to testify contrary to his report was revealed at trial. "Where the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady* is not violated." *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996). Because petitioner has not demonstrated that the basis of either aspect of his first claim was not readily available to counsel such that counsel was unable to comply with state procedural rules, has not established cause. As such, prejudice need not be discussed. *Asker v. Class*, 152 F.3d 863, 871 (8th Cir. 1998) (citations omitted). Therefore, petitioner's first ground should be dismissed.

**Claim Three**

Petitioner claims as his third ground that Petitioner was deprived of a fair trial and due process of law in violation of the Sixth and Fourteenth Amendments because the prosecutor knowingly presented false serology evidence concerning the blood on the knife seized at the scene and failed to disclose the fact that the knife handle was not conductive to fingerprints. Respondent again argues that the petitioner is procedurally barred from advancing this claim in federal court and that petitioner cannot demonstrate cause and prejudice or actual innocence to overcome this bar.

The undersigned agrees that petitioner is procedurally barred from presenting this claim in federal court. Similar to his first claim, discussed in detail above, petitioner did not raise this claim in his motion for a new trial. Instead, he raised it in his motion for post-conviction relief. On appeal, the Missouri Court of Appeals determined that this claim was not properly before the court.

Petitioner can overcome the bar by demonstrating cause and prejudice or actual innocence. Here, the petitioner claims that he is able to show cause and prejudice and actual innocence such that this court should review the merits of his claim. First, petitioner asserts that the state's alleged failure to disclose the fact that the knife handle was not conducive to fingerprints was a factor external to the defense. Also, petitioner claims that he could not have discovered this evidence earlier, as the evidence was disclosed during the post-conviction hearings on remand. Further, petitioner argues that he is actually innocent in that the evidence demonstrated that petitioner shot his wife in defense of himself and his child.

With regard to the serology testing, petitioner claims that the criminologist, Donna Becherer, testified that she could not retrieve enough blood on the knife to test it. However, petitioner states that she later testified during the post-conviction hearings that she did conduct a serology test which indicated that blood was present on the knife which matched the victim's blood type.

Review of the post-conviction hearing transcript reveals that she testified consistent with her trial

testimony that there was not enough blood on the handle to type. (Pet. Exh. R, p. 125; Pet. Exh. L, p. 1048) During the hearings, Ms. Becherer did state that she attempted to type the blood on the handle and could only get enough blood to perform an Adenylate Kinase-1 test. She stated, however, that 99% of the Caucasian population are type 1. (Pet. Exh. R, p. 126) Therefore, contrary to petitioner's assertion that the criminologist admitted that "she typed the blood from the knife and that it matched the victim's blood," Ms. Becherer testifed that the only test she could perform resulted in a match with 99% of all Caucasians. This is not deliberately suppressed evidence which would establish cause as the petitioner submits.

Additionally, this information does not meet the actual innocence standard. First, this is not new evidence. Petitioner had Ms. Becherer's pretrial report. Further, there is no showing that no reasonable juror would have convicted petitioner if the jury had known that the blood type matched the victim's and 99% of the Caucasian population. Ms. Becherer testified that in the photos she observed, there was "blood on the arm and the hand has a lot of blood on it." (Pet. Exh. L, p. 1049) However, the knife had only a smear of blood. It was legitimate for the jurors to conclude that the victim was not holding a knife when she was shot.

With regard to petitioner's assertion that Officer Laux also gave false testimony regarding the blood on the knife, the undersigned finds that petitioner cannot overcome the procedural bar. Officer Laux testified that he found hand prints and finger prints of blood on the door jambs. Also, her right hand was covered with thick blood. (Pet. Exh. K, pp. 685-86; 696) He further testified that she

was shot in the right arm and bleeding down her arm as she proceeded through the hall, yet there was no blood on the knife except a small smear on the handle. (Pet. Exh. K, pp. 750-51). This evidence is not inconsistent with any of the subsequent testimonies. As such, there is no new evidence pointing to petitioner's innocence, and this Court is precluded from reading the merits of this aspect of petitioner's third claims.

With regard to the petitioner's contention that the state suppressed evidence that the knife handle was not conducive to fingerprints, the undersigned finds that petitioner has not demonstrated cause and prejudice or actual innocence. There is nothing to indicate from the petitioner's pleadings or from the transcripts that Officer Laux testified to the jury regarding the lack of fingerprints. While petitioner points to the police report which stated no fingerprints were found, there is no indication that the jury saw this report or even knew that the victim's fingerprints were not found on the knife. Thus, the fact that Officer Laux later testified that the handle was not conducive to fingerprints (Pet. Exh. R, p. 48) is not new evidence exonerating the petitioner. There is simply no evidence that the jury relied on this information to make its decision to convict, or that, given Officer Laux' testimony during the 29.15 hearing, they would have believed that petitioner killed his wife in self-defense. Because petitioner cannot demonstrate cause and prejudice or a miscarriage of justice, his third claim for habeas relief should be denied as procedurally barred.

**Claim Five**

As his fifth and final claim, petitioner alleges that he was deprived of the right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments in that trial counsel made errors so serious that the entire proceeding was rendered fundamentally unfair and the verdict suspect. The undersigned will address each specific point in turn.

First, petitioner argues that trial counsel failed to impeach Dr. Graham's false expert testimony in support of the state's theory that petitioner's wife was shot while lying on the floor. In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court stated that a petitioner claiming ineffective assistance of counsel must establish that his counsel's performance was deficient and that the deficient performance prejudiced his defense. *Id.* at 700. In establishing the requisite element of prejudice, the petitioner must show that the decision reached would likely have been different absent the error. *Id.* at 694; *Griffin v. Delo*, 33 F.3d 895, 900 (8th Cir. 1994).

To determine whether counsel's performance was deficient, the inquiry must be whether, in light of all circumstances, the identified acts or ommissions were outside the range of professionally competent assistance. *Strickland*, 466 U.S. at 690. Because a habeas petition claiming ineffective counsel involves mixed questions of law and fact, legal conclusions are reviewed de novo, and state court findings of fact are presumed to be correct under 28 U.S.C. § 2254(d). *Sloan v. Delo*, 54 F.3d 1371, 1383 (8th Cir. 1995) (citing *Laws v. Armontrout*, 863 F.2d 1377, 1381-82 (8th Cir. 1988) (en banc)).

The Missouri Court of Appeals reviewed this claim in petitioner's Rule 29.15 motion. The court found the following:

> Here, the record reveals that on cross-examination, counsel got Dr. Graham to admit that the last two bullet wounds inflicted upon victim were consistent with her being shot while standing, which supported the appellant's theory of self-defense. Furthermore, at the post-conviction hearing, Dr. Graham testified that whether or not the wound was "shored" was not the sole basis for his opinion that victim was lying down when shot. Instead, he testified that his opinion was primarily based upon the fact that victim received a gunshot wound [sic] to the back, the bullet exited the front of her chest, and went into her wrist. . . . Here, trial counsel got Dr. Graham to admit that the entry of the last two bullet wounds were consistent with appellant's theory of self-defense, and as a result, his cross-examination was reasonable under the circumstances, and the findings and conclusions of the motion court are not clearly erroneous.

(Pet. Exh. E, p. 11)

The factual findings of the state court are presumed to be correct. The court determined that petitioner's attorney got the coroner to admit that the entry of the last two bullet wounds were consistent with the petitioner's theory that he shot his wife in self-defense. Indeed, the record reflects that Dr. Graham testified on cross-examination that there were many possible scenarios regarding what position the victim was in when shot. Further, petitioner's attorney elicited testimony that it was possible for people to engage in physical activity after sustaining a

potentially lethal wound. (Pet. Exh. L, pp. 1011-1014) This supports the petitioner's theory that he shot his wife as she attacked him with a knife.

The record shows that petitioner's attorney was not deficient, as required by *Strickland*. He asked the coroner questions regarding other possible positions that the victim could have been in when shot. He got Dr. Graham to admit that he was not telling the jury that the victim was laying down when shot, only that it was one of several possibilities. Petitioner's attorney was setting the stage for his own expert who would testify that it was impossible for petitioner's wife to have been shot while lying down. While he testified during the post-conviction motion hearings that a portion of his questioning reaffirmed the state's position (Pet. Exh. T, p. 91), he also testified that it is his theory to concentrate on the fear aspect, not the ballistics, in a self-defense case. (Pet. Exh. T, p. 106) In addition, counsel testified that he did not see any need to let the coroner repeat the State's position that the victim was shot on the floor because Dr. Graham had stated that it was a mere possibility. Further, counsel stated that he had his own witness to refute Dr. Graham's testimony (Pet. Exh. P, p. 113)

The undersigned finds that this was trial strategy and was not deficient performance as petitioner submits. "Under *Strickland,* there is a strong presumption that an attorney's performance is professionally reasonable. . . . Moreover, *Strickland* holds that decisions related to trial strategy are virtually unchallengeable." *Bowman v. Gammon,* 85 F.3d 1339, 1345 (8th Cir. 1996) (citing *Strickland v. Washington,* 466 U.S. 668, 689, 690 (1984)). "Reasonable trial strategy does not constitute ineffective assistance of

counsel simply because it is not successful." *James v. State*, 100 F.3d 586, 590 (8th Cir. 1996) (citations omitted). Likewise, petitioner was not prejudiced by this defense. Dr. Graham testified that there were a number of scenarios regarding the victim's position when she was shot. He also stated that the shored exit wound was not the only evidence that led him to believe that the victim was laying on the floor when shot. There is no indication that petitioner was convicted on the basis of the shored wound and that if his attorney had impeached him with the report, the jury would have believed self-defense and rendered a different verdict. Thus, petitioner's first claim of ineffective assistance of counsel should be denied.

Petitioner next asserts that counsel was ineffective because he failed to point out the absence of gun shot residue on the back of the victim's shirt. The Missouri Court of Appeals found:

> In the underlying trial, Becherer testified that she had examined victim's shirt and had not found any gun residues on the back of it. She also testified that test-firings of appellant's gun produced a visible vaporous residue pattern at a distance of nine inches but not at fifteen inches. At the postconviction hearing, she testified that partially burnt gunpowder flakes from ammunition like that used by appellant travelled up to forty-two inches during testing. However, she also testified that gunpowder flakes can very readily fall off if the cloth is moved.
>
> Here, the record reveals that victim's body and clothing were moved after her death and

> before Becherer's tests, and soot and gunpowder flakes may have fallen off of her body and clothing. As a result, trial counsel was not ineffective for his failure to argue that the lack of soot and gunpowder flakes contradicted the State's theory of the case, and the finding and conclusion of the motion court is not clearly erroneous.

(Pet. Exh. E, p. 13)

The factual findings are entitled to a presumption of correctness. Petitioner's attorney testified that the lack of gun residue did not necessarily contradict the State's position. (Pet. Exh. P, pp. 117-120) Petitioner's attorney also testified that he was concentrating on the fear of petitioner, not the ballistics of the case. He stated that " . . . I was more concerned about showing the fear in the defendant and that he fired irrespective of what position she was in. She was attacking him and he isn't sure when he's out of danger. And I have found that you have more luck with the self-defense theory when you leave it at basic self-defense, fear." (Pet. Exh. P, pp. 102)

Again, this is trial strategy. As previously stated, these decisions are virtually unchallengeable. This determination was reasonable, as there is no showing that the absence of gunpowder flakes contradicted the state's theory. Given the fact that this information would not necessarily have aided the petitioner's case, there is no showing of prejudice. Petitioner's second point should also be denied.

For his third point, petitioner argues that counsel failed to present evidence and argue that the evidence concerning the last shot was inconsistent with the state's

theory of the case, while consistent with petitioner's testimony. Petitioner contends that his attorney failed to present evidence that the fifth shot was not shored and did not occur while the victim was lying on the floor.

The state court addressed this issue, finding that two of the experts, Dr. Dix and Dr. Graham, presented testimony that was consistent with the state's theory. Both doctors testified at the postconviction hearing that the blood pattern could be consistent with the victim lying down when shot. Therefore, the court found that petitioner's attorney was not ineffective for failing to pursue this. (Pet. Exh. E, pp. 13-14) Respondent argues that Dr. Dix later concluded, however, that to a scientific certainty, the victim was not on the floor when she received the last two shots. (Pet. Exh. S, p. 80)

The findings of the state court are presumed to be correct. Further, the record demonstrates that Dr. Dix did testify at the hearing that the blood could be consistent with the victim lying down, as a photograph of the victim revealed blood flowing down to the side of her body toward the floor. (Pet. Exh. S, pp. 67-68) In addition, petitioner's attorney presented expert testimony from Dr. Charles Petty stating that the exit wounds were not shored and that the victim did not receive any gun shots while lying on the floor. (Pet. Exh. N, p. 1533) Because petitioner's attorney did make this argument and did elicit testimony corroborating petitioner's story, his conduct was not deficient as required by *Strickland*. The court need not address prejudice. *Strickland*, 466 U.S. at 699. Petitioner's third argument that his counsel was ineffective should therefore be denied.

As his fourth point, petitioner argues that his trial attorney failed to present evidence and argue that the trajectory angles of the last two shots were inconsistent with the state's theory of the case while consistent with the petitioner's testimony that the shots occurred while the victim was attacking him. The Missouri Court of Appeals addressed this point, finding:

> Here, appellant's expert, Dr. Dix, testified that the different trajectories could be explained by movement of appellant or victim between shots. Furthermore, he testified that it was possible the victim could have continued to move even after being shot several times because adrenaline sometimes allows people to act under conditions that they otherwise would not be able to. Therefore, even if trial counsel had presented evidence of the trajectory of the bullet wounds, it would not have destroyed the State's theory that victim was lying down when shot. As a result, the motion court did not clearly err in concluding that the proposed evidence would not have altered the outcome of the trial.

(Pet. Exh. E, p. 12).

Again, the findings of fact are presumed to be correct. Further, contrary to petitioner's opinion, the shored exit wound was not the only evidence supporting the state's theory that the victim was shot while lying on the floor. Dr. Graham testified at trial and during the hearings that there were a number of factors considered, including the blood, as previously discussed, the position of the body, the fact that a bullet was found in her shirt, and the trajectory of the bullets. (Pet. Exh. S, pp. 40-41; Exh. R, pp. 183-184) In fact, Dr. Graham stated during the

postconviction hearings that the shored wound made no difference as to his opinion that the wound was consistent with the victim being on the floor when shot. (Pet. Exh. R, p. 190; S, p. 40)

Furthermore, while Dr. Graham, Dr. Dix, and Dr. Petty all testified that the trajectories of the fourth and fifth bullets could be consistent with the victim being shot while standing, they also stated that there were other explanations, such as movement of the victim or petitioner between shots to account for the different trajectories. (Pet. Exh. S, pp. 61-64; 72-73; 187-190; Exh. R, pp. 336-338; 368-369) Thus, the state court is correct in stating that testimony regarding the trajectories would not have destroyed the state's case in favor of the petitioner's case. Counsel exercised sound trial strategy in emphasizing the self-defense aspect of the case instead of the ballistics, which would not necessarily have aided the petitioner's case. As previously stated, trial strategy is virtually unchallengeable. The undersigned finds that counsel's actions in this regard were reasonable and that the outcome of the case would not have been different if he had pursued evidence regarding the bullet trajectories. Therefore, the fourth point in petitioner's ineffective assistance of counsel argument should be denied.

Fifth, petitioner maintains that counsel allowed misleading defense expert testimony from Dr. Petty to alter the entire evidentiary picture and have a devastating effect on the petitioner's defense. The Missouri Court of Appeals addressed this point, finding that choice of witnesses is a matter of trial strategy and will not support an ineffective assistance of counsel claim. (Pet. Exh. E, p. 14) Further, the court determined that counsel sent Dr. Petty

photographs, police reports, laboratory reports, evidence technician reports, and medical examiner reports. In addition, counsel spoke with Dr. Petty on the phone and met with him in St. Louis. The court also determined that "Dr. Petty's testimony during cross-examination supported appellant's theory that he was engaged in a struggle with the victim. This conflicted with the State's theory that victim was shot while lying on the floor." (Pet. Exh. E, p. 15) Finally, the record indicated that trial counsel did not want Dr. Petty to testify because he had a condescending attitude and would make a bad impression on the jury, but that counsel put him on the stand at the insistence of his client. The court held that counsel's performance was reasonable and that petitioner failed to show that the outcome of the trial would have been different. (Pet. Exh. E, p. 15)

The undersigned agrees with this analysis. According to counsel, petitioner insisted on putting Dr. Petty on the stand, despite counsel's advice that the jury may not like the witness. Counsel met with Dr. Petty and discussed the case prior to trial; however, he believed that the doctor's testimony did not help petitioner's case. Petitioner insisted that the defense call Dr. Petty as a witness. (Pet. Exh. R, pp. 250-251) Further, counsel testified that he sent Dr. Petty everything he wanted to know about the case and discussed the self-defense theory with him. (Pet. Exh. 253-254).

As petitioner admits, choice of witnesses is a trial strategy. As previously stated, trial strategy is virtually unchallengeable. Further, it was through petitioner's insistence that his attorney put Dr. Petty on the stand. (Pet. Exh. R, p. 276) Petitioner cannot now claim that his

attorney was ineffective for honoring his wishes. Therefore, the fact that counsel put Dr. Petty on the stand as a defense witness was not unreasonable, and prejudice need not be discussed. Petitioner's fifth point should therefore be denied.

For his sixth claim petitioner argues that counsel was ineffective in that he allowed the introduction of inadmissible and highly prejudicial evidence concerning petitioner's prior assault on his wife and their unborn child. The state court determined that appellant had insisted that counsel cross-examine the witness regarding this matter against counsel's advise. (Pet. Exh. E, p. 10) The court found that the impeachment attempts were not unreasonable. (*Id.*)

The undersigned agrees that counsel's actions were not unreasonable. He testified that petitioner insisted that he cross-examine Eleni Zavredinos, and so he complied with petitioner's demands. (Pet. Exh. P, pp. 90-91) This again is trial strategy made at the behest of petitioner. He cannot now claim that it was bad strategy because the outcome was not as he desired. *James,* 100 F.3d at 590. Thus, petitioner is unable to demonstrate that his attorney's performance fell below the standard of reasonableness or that the outcome would have been different had Eleni not been cross-examined on that issue. Therefore, petitioner's sixth point of ineffective assistance of counsel should be denied.

Finally, petitioner claims that the state court erroneously applied constitutional law concerning the prejudice component of the *Strickland* test. Petitioner maintains that hte [sic] court should have employed a cumulative

effect test in assessing the prejudice resulting from counsel's alleged errors.

The record shows that the Missouri Court of Appeals properly applied the *Strickland* analysis when reviewing petitioner's claims of ineffective assistance of counsel. In most instances, the court found that counsel's actions were reasonable, and therefore, the court did not need to address prejudice. When the court did address the prejudice component, it determined whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Petitioner's argument that the prejudicial aspect should be viewed cumulatively has been rejected in this circuit and this district. *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Roberts v. Bowersox*, 61 F. Supp. 2d 896, 940 (E.D. Mo. 1999). The Eighth Circuit Court of Appeals has expressly held that "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation. . . . Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief." *Wainwright*, 80 F.3d at 1233 (citations omitted). This Court will comply with the directives of the Eighth Circuit. The state court and the undersigned have applied the proper *Strickland* analysis and determined that petitioner did not receive ineffective assistance of counsel. Therefore, petitioner's final point should be denied.

Accordingly,

**IT IS HEREBY RECOMMENDED** that the petition of Michael Athanasiades be **DISMISSED** without further proceedings.

**IT IS FURTHER RECOMMENDED** that all pending motions be **DENIED** as **MOOT**.

The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. *See Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

/s/ Terry I. Adelman
**TERRY I. ADELMAN**
**UNITED STATES**
**MAGISTRATE JUDGE**

Dated this 21st day of January, 2000.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| MICHAEL ATHANASIADES, | ) | |
| Movant, | ) | |
| v. | ) | No. 4:96CV730 |
| UNITED STATES OF AMERICA, | ) | (CEJ) |
| Respondent. | ) | |

**MEMORANDUM AND ORDER**

(Filed Oct. 02, 2000)

This matter is before the Court on the application of Michael Athanasiades for a certificate of appealability pursuant to 28 U.S.C. § 2253. This Court denied Athanasiade's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2254 in an order filed August 28, 2000. Because Athanasiades has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability will be denied. *See Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) (substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings").

Accordingly,

**IT IS HEREBY ORDERED** that the motion for a certificate of appealability [# 65] is **denied**.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of October, 2000.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 00-3553

| | |
|---|---|
| Michael Athanasiades, | * |
| | * |
| Appellant, | * |
| vs. | * Order Denying Petition |
| | * for Rehearing and for |
| Michael Bowersox, Warden, | * Rehearing En Banc |
| Appellee. | * |
| | * |

(Filed Jan. 26, 2001)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

January 26, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, DC 20543-0001**

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 29, 2001

Mr. Barry A. Short
Lewis, Rice & Fingersh
500 N. Broadway, Ste. 2000
St. Louis, MO 63102

Re: Michael Athanasiades
v. Michael Bowersox, Superintendent,
Potosi Correctional Center, et al.
Application No. 00A842

Dear Mr. Short:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on March 29, 2001, extended the time to and including June 25, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk